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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 ARTURO ESTRADA,) NO. EDCV 09-02079 DDP (SS)
12)
13 Plaintiff,)
14) **REPORT AND RECOMMENDATION OF**
15 v.) **UNITED STATES MAGISTRATE JUDGE**
16 MIGUEL MUNOZ, ET AL.,)
17)
18 Defendants.)
19 _____)
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23 This Report and Recommendation is submitted to the Honorable Dean
24 D. Pregerson, United States District Judge, pursuant to 28 U.S.C. § 636
25 and General Order 05-07 of the United States District Court for the
26 Central District of California.
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29 **I.**

30 **INTRODUCTION**

31 Arturo Estrada ("Plaintiff"), a state prisoner proceeding pro se,
32 filed a Complaint pursuant to 42 U.S.C. § 1983 (the "Complaint") on
33 November 6, 2009. On December 1, 2009, the Court dismissed the
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1 Complaint with leave to amend and granted Plaintiff thirty days to file
2 a First Amended Complaint.¹ On February 4, 2010, Plaintiff filed a First
3 Amended Complaint (or "FAC"), accompanied by a Supplemental Pleading
4 ("FAC Supp.") and five Exhibits. On May 17, 2010, the Court dismissed
5 the First Amended Complaint with leave to amend and granted Plaintiff
6 thirty days to file a Second Amended Complaint. As of today, Plaintiff
7 has not filed a Second Amended Complaint. It is therefore recommended
8 that this action be dismissed with prejudice for failure to prosecute.
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10 II.

11 BACKGROUND

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13 Plaintiff's First Amended Complaint named as Defendants Miguel
14 Munoz, a Riverside County deputy sheriff, and Stanley Sniff, Riverside
15 County's Sheriff-Coroner. Plaintiff claimed that Defendant Munoz
16 intercepted Plaintiff's legal and personal mail while Plaintiff was held
17 at the Robert Presley Detention Center in Riverside, California.
18 Defendant Munoz then allegedly used the mail for his own benefit in a
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20 ¹ The Court issued a Report and Recommendation on January 28, 2010,
21 recommending dismissal of this action pursuant to Federal Rule of Civil
22 Procedure 41(b) because Plaintiff had not timely filed a First Amended
23 Complaint. On that same date, Plaintiff filed an Application for
24 Extension of Time to File First Amended Complaint stating that on
25 January 11, 2010, he had first received the Court's December 1, 2009
26 Order dismissing the Complaint with leave to amend and a later Order sua
27 sponte extending time to respond to the December 1, 2010 Order. The
28 Court therefore vacated the January 28, 2010 Report and Recommendation
and granted Plaintiff until February 8, 2010 to file his First Amended
Complaint. However, after the First Amended Complaint was filed, the
Court again dismissed the complaint with leave to amend, for various
pleading deficiencies. Plaintiff then failed to file a Second Amended
Complaint.

1 dispute over custody of his daughter. (See FAC at 3, 5; FAC Supp. at 3;
2 FAC, Exhs. B, D). Some of this mail was "forever withheld and never
3 reached its intended recipient."² (FAC at 5). Plaintiff further claimed
4 that Defendant Sniff has a "policy of allowing unauthorized persons
5 access to the mail . . . of . . . jail inmate-detainees." (Id.; see
6 also FAC Supp. at 3-4). Plaintiff claimed the interference with his
7 mail violated his Sixth Amendment right to counsel, his right to
8 privacy, and his Fifth and Fourteenth Amendment rights. (See FAC at 5;
9 FAC Supp. at 3). He asked for money damages, including damages for
10 emotional distress, as well as declaratory and injunctive relief. (FAC
11 at 6; FAC Supp. at 4).

12
13 On May 17, 2010, pursuant to the congressionally mandated screening
14 of civil actions brought by prisoners seeking redress from governmental
15 entities or employees, see 28 U.S.C. § 1915A(a), the Court issued an
16 Order Dismissing the First Amended Complaint with Leave to Amend. In
17 this initial screening, the Court found that some of Plaintiff's claims
18 were barred by Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L.
19 Ed. 2d 383 (1994). It further found that Plaintiff's claims for damages
20 due to emotional distress were barred by the Prison Litigation Reform
21 Act ("PLRA").³ The Court granted Plaintiff thirty days leave to amend.
22 At the same time, the Court cautioned Plaintiff that the failure to
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24 ² Plaintiff included an allegation that Defendant Munoz "may have
25 also shared . . . personal and confidential legal mail with other[]
26 persons and agencies, whose identities are unknown," but did not include
any specific allegations regarding this charge. (See FAC at 5).

27 ³ The Court also noted that Plaintiff had apparently failed to
28 exhaust his administrative remedies, but did not dismiss the First
Amended Complaint on that ground.

1 timely file a Second Amended Complaint would result in a recommendation
2 that his action be dismissed for failure to prosecute pursuant to
3 Federal Rule of Civil Procedure 41(b). To date, Plaintiff has failed to
4 file a Second Amended Complaint or otherwise communicate with the Court.
5 As such, dismissal is recommended.

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7 **III.**

8 **DISCUSSION**

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10 **Plaintiff's Action Should Be Dismissed For Failure To Prosecute**

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12 Federal Rule of Civil Procedure 41(b) grants district courts the
13 authority to dismiss actions sua sponte for failure to prosecute or to
14 comply with court orders. Link v. Wabash R.R. Co., 370 U.S. 626, 629-
15 31, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) ("The power to invoke this
16 sanction is necessary in order to prevent undue delays in the
17 disposition of pending cases and to avoid congestion in the calendars of
18 the District Courts."). Dismissal, however, is a harsh penalty and is
19 to be imposed only in extreme circumstances. Henderson v. Duncan, 779
20 F.2d 1421, 1423 (9th Cir. 1986) (citing Raiford v. Pounds, 640 F.2d 944,
21 945 (9th Cir. 1981) (per curiam)). In considering whether to dismiss an
22 action for failure to prosecute or to comply with a court order, the
23 Court must weigh five factors: "(1) the public's interest in expeditious
24 resolution of litigation; (2) the court's need to manage its docket; (3)
25 the risk of prejudice to defendants/respondents; (4) the availability of
26 less drastic alternatives; and (5) the public policy favoring
27 disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d
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639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

1. The Five Factors Supporting Dismissal

a. Expeditious Resolution And The Court's Need To Manage Its Docket

In the instant action, the first two factors - public interest in expeditious resolution of litigation and the need to manage the Court's docket - weigh in favor of dismissal. The Court granted Plaintiff until June 16, 2010, to file a Second Amended Complaint if he wished to pursue his claims. As of the date of this Report and Recommendation, Plaintiff has failed to file an amended complaint or otherwise communicate with the Court. Plaintiff's conduct hinders the Court's ability to move this case towards disposition and indicates that Plaintiff does not intend to litigate this action diligently.

b. The Risk Of Prejudice To Defendant

The third factor - prejudice to Defendants - also counsels in favor of dismissal. The prejudice to a defendant simply from the pendency of a lawsuit is insufficient, on its own, to warrant dismissal. Ash v. Cvetkov, 739 F.2d 493, 496 (9th Cir. 1984). The risk of prejudice, however, is related to the plaintiff's reason for defaulting. Pagtalunan, 291 F.3d at 642 (citing Yourish v. California Amplifier, 191 F.3d 983, 991 (9th Cir. 1999)).

1 Plaintiff has not requested any extensions of time or offered any
2 excuse for his failure to file a Second Amended Complaint. Where a
3 party offers a poor excuse for failing to comply with a court's order,
4 the prejudice to the opposing party is sufficient to favor dismissal.
5 Yourish, 191 F.3d at 991-92. Here, Plaintiff has offered no excuse for
6 failing to file an amended complaint and therefore the "prejudice"
7 element favors dismissal.

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9 **c. Less Drastic Alternatives**

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11 The fourth factor - the availability of less drastic sanctions -
12 ordinarily counsels against dismissal. The Court has, however,
13 attempted to avoid outright dismissal by giving Plaintiff an opportunity
14 to file a Second Amended Complaint. The Court has, therefore, explored
15 meaningful alternatives to dismissal. See Henderson, 779 F.2d at 1424
16 ("The district court need not exhaust every sanction short of dismissal
17 before finally dismissing a case, but must explore possible and
18 meaningful alternatives." (citation omitted)). Sanctions other than
19 dismissal do not appear to be appropriate given that Plaintiff has
20 failed to participate in his own litigation.

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22 **d. Public Policy Favoring Disposition On The Merits**

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24 The fifth factor - public policy favoring disposition of cases on
25 their merits - also ordinarily weighs against dismissal.
26 Notwithstanding this policy, it is the responsibility of the moving
27 party to move toward that disposition at a reasonable pace and to
28 refrain from dilatory and evasive tactics. Morris v. Morgan Stanley &

1 Co., 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not discharged
2 this responsibility despite having ample time. Under these
3 circumstances, the public policy favoring resolution of disputes on the
4 merits does not outweigh Plaintiff's failure to file an amended
5 complaint in the given time frame.

6 7 **2. Dismissal Of This Action Is Warranted**

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9 In view of the foregoing, the Court concludes that dismissal of
10 Plaintiff's action is warranted under Rule 41(b), which states in
11 pertinent part:

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13 [A] dismissal under this subdivision (b) and any
14 dismissal not under this rule - except one for lack
15 of jurisdiction, improper venue, or failure to join
16 a party under Rule 19 - operates as an adjudication
17 on the merits.

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19 This case does not fall into one of these three exceptions and,
20 consequently, the dismissal will operate as an adjudication on the
21 merits and thus will be with prejudice to Plaintiff's refiling of a new
22 action in federal court based on the same allegations. Stewart v. U.S.
23 Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (dismissal interpreted as an
24 adjudication on the merits unless one of the Rule 41(b) exceptions
25 applies); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 714
26 (9th Cir. 2001) (dismissal for failure to prosecute is treated as an
27 adjudication on the merits (citing United States v. Schimmels (In re
28 Schimmels), 127 F.3d 875, 884 (9th Cir. 1997))).

1 In sum, Plaintiff was advised in the May 17, 2010 Order about the
2 possibility of dismissal with prejudice in the event of a failure to
3 file a Second Amended Complaint, and will be given further notice by
4 service of this Report and Recommendation. Plaintiff will have the
5 opportunity to file objections to this Report and Recommendation if he
6 wishes to contest the dismissal of his action.

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8 **IV.**

9 **RECOMMENDATION**

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11 IT IS RECOMMENDED that the District Court issue an Order (1)
12 accepting and adopting this Report and Recommendation and (2) directing
13 that Judgment be entered dismissing this action with prejudice for
14 failure to prosecute and obey court orders.

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16 DATED: June 30, 2010.

17 /s/
18 SUZANNE H. SEGAL
19 UNITED STATES MAGISTRATE JUDGE
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NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.